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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DELONGIS, Defendant and Appellant.	A105041 (Sonoma County Super. Ct. No. SCR-32538)

Following a jury trial defendant was convicted of second degree murder (Pen. Code, § 187, subd. (a)),[1] and spousal battery (§ 273.5, subd. (a)) with personal infliction of great bodily injury (§ 12022.7, subd. (e)). He was sentenced to a term of 15 years to life for murder, and a consecutive eight-year term for spousal battery and the great bodily injury enhancement. In this appeal he argues that the trial court gave inadequate instructions on malice and voluntary intoxication, erred by failing to give a unanimity instruction, improperly sentenced him to multiple terms for the murder and spousal battery convictions, and violated his jury trial rights under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*), by imposing upper and consecutive terms. We conclude that no prejudicial instructional or sentencing errors occurred, and affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF FACTS

Defendant and his wife Kim, the murder victim, lived in a house on Brown Court in Petaluma that he built in 1994. According to the testimony adduced at trial, no physical violence was known to be associated with their relationship. Defendant's persistent, excessive alcohol consumption and inebriation created an ongoing conflict between them throughout their marriage, however. Defendant acknowledged his failure to fulfill his repeated promises to Kim that he would stop drinking, and never sought treatment for his admitted alcoholism. During the marriage defendant was also plagued intermittently by agoraphobia and anxiety attacks, that he claimed were somewhat ameliorated by drinking. Around 1995, defendant briefly had a "close" romantic attachment to another woman—although he denied that a sexual relationship occurred—which Kim discovered and asked him "to stop." Thereafter, Kim "didn't trust" him, and they discussed divorce several times, although they "stayed together."

During the Labor Day weekend in 2002, Kim "caught" defendant drinking on Friday and again on Monday, which precipitated heated arguments between them and further allusions to divorce from her. On Monday night, they went to bed very angry with each other.

In a statement to the police defendant recalled that when he and Kim awoke on Tuesday morning she told him, "don't touch me," and repeated her threat to divorce him. Defendant arose first and took their two dogs downstairs while Kim remained upstairs in the bedroom. He drank some beer and half a bottle of wine, read the newspaper, completed some chores downstairs, and went upstairs to say goodbye to Kim before leaving for work. Kim said "she didn't care" and was "on her way to find a lawyer." She called defendant a "complete loser" and a "liar." Kim expressed to defendant that she "hated" him and "wanted a divorce."

He was frightened and angry with the realization from the "hate in her eyes" that Kim was really "going to leave" him and "destroy" his life. Defendant testified that he was not "going to let that happen," and "snapped." As Kim walked toward the top of the

stairs he kicked her forcefully from behind. Kim fell hard "head first" to the bottom of the stairs.

Defendant testified that he did not "have a clear recollection" of the ensuing events, but was aware of "flying down the stairs" after Kim in a rage. He felt as if he "was in a movie" and had "tunnel vision," like he "wasn't there." On his way down the stairs he noticed a hole in the wall. When defendant reached the bottom of the stairs, he "couldn't tell" if Kim was still alive. He straddled Kim, grabbed her hair and "smashed her head into the floor." He then placed his hands around her neck and "choked her."

Defendant testified that he did not remember "stopping." His next recollection was standing in the dining room near the phone, with his hands "all bloody." He was "dizzy," and "couldn't breathe." He quickly washed the blood from his hands, then "dialed 911" at 8:50 a.m. He told the public safety dispatcher that Kim "fell down the stairs" and may not be breathing.

When the paramedics, firefighters and police officers arrived, they observed that the victim was lying on the floor at the bottom of the stairs. She had blood on her head, her face was swollen, and her neck was swollen and bruised on both sides of the trachea. She also appeared "blue from the neck up" due to lack of oxygen, and her jaw was clenched. She had no pulse and was not breathing. A paramedic testified that the victim's condition indicated she had not been breathing "for a much longer time" than it took to respond to the call.

A shirt and a sweat shirt stained with blood were observed on the floor near the victim. The victim's hair and blood were found at the bottom of a "large hole" visible in the wall two feet above the stairs and about half way down the stairway. Blood was also seen on the molding of the stairs and the entryway of the house.

While emergency personnel attempted to resuscitate Kim, defendant was questioned and kept in the kitchen or yard, away from the immediate "crime scene." He had the victim's blood on his hands, under his fingernails, and on his shoes and shorts; his hands were shaking. To one officer he smelled strongly of alcohol, although he did

not act or appear to be intoxicated. Resuscitation efforts were unsuccessful, and Kim was declared dead at the scene at 9:09 a.m.

During several sessions of questioning at his house and later that morning at the police station defendant repeatedly falsely told the officers that he was outside in the yard when he heard a loud crash or banging in the house. He claimed that he went inside and discovered Kim lying face down on the floor at the foot of the stairs. He stated "there was blood everywhere," and Kim "wasn't breathing," so he attempted "the CPR thing." In his statements defendant suggested to the officers that Kim fell or the dogs may have knocked her down the stairs.

When confronted later that evening with accusations by the officers that he was "not being totally honest," defendant admitted that he kicked Kim down the stairs and strangled her, as he testified at trial. Defendant explained in his testimony that he "lied" to the officers because he "was scared," and "couldn't believe" he had pushed Kim down the stairs.

In a subsequent conversation with a friend while defendant was incarcerated, he stated that he "lost [his] temper" after Kim kept "pushing" him. Once Kim "went down hard" to the bottom of the stairs, defendant realized that "her head was broken up" so badly that he "had to stop her breathing."

The autopsy revealed that the victim suffered multiple blunt force lacerations and abrasions to the head, neck, face, and torso, all of which were inflicted before she died but none of which were fatal injuries. A forensic pathologist testified that he believed a serious laceration to the victim's forehead was caused by a "tremendous amount of force" used to smash her head into the wall where the hole was found, rather than from the fall down the stairs. The cause of her death was asphyxia due to manual strangulation. The victim's injuries also indicated that she was conscious and struggling when she was strangled.

The defense presented testimony from a forensic toxicologist that a blood sample taken from defendant at 11:00 o'clock in the morning measured his blood-alcohol level at .19. Thus, based upon the rate of "elimination" of alcohol from the body, his blood-

alcohol level two hours earlier when the police arrived at his home was between .21 and .22. Although "people have different types of tolerance" to alcohol, anyone with a blood-alcohol level of around .21 will suffer "cognitive or decision-making" impairment, lowered self-control and inhibitions, a decrease in the ability to perceive and comprehend, along with a decline in "critical judgment."

The chief psychologist for the Pleasant Valley State Prison offered his opinion for the defense that when the killing occurred defendant suffered from alcohol dependence—in remission following his incarceration—and personality disorder with traits of agoraphobia, anxiety, paranoia, and depression, but no organic brain ailment. Upon evaluation defendant was found very controlling and jealous of his wife. Those who suffer from defendant's personality traits are "particularly susceptible to a rage reaction," especially in a stressful situation with the "disinhibiting effects of alcohol." The psychologist also testified that a rage reaction is an "instantaneous response" to external stimuli rather than the product of "considered thought." A psychiatrist at the Sonoma County jail testified that while defendant was in the mental health unit he experienced alcohol withdrawal symptoms, which included visual hallucinations, disorientation, and delirium tremors.[2]

DISCUSSION

I. The Failure to Give an Instruction on Malice and Voluntary Intoxication.

Defendant argues that the trial court erred by refusing to give the requested defense instruction in the terms of CALJIC No. 4.21.1 on consideration of the effect of his voluntary intoxication upon the "specific intent or mental state" required for a conviction of murder. The jury was instructed on the lesser offense of voluntary manslaughter based upon heat of passion or sudden provocation, and given the definition of voluntary intoxication. Defendant complains that without the additional CALJIC No. 4.21.1 instruction the jury was "provided inadequate guidance" to consider the impact of

[2] Defendant's symptoms are exhibited by only five percent of those who "suffer through alcohol withdrawal."

evidence of his voluntary intoxication "on the element of malice aforethought." He therefore maintains that the instructions were "prejudicially incomplete."

A defendant's right to a pinpoint instruction is premised upon the trial court's obligation to "instruct the jury 'on the law applicable to each particular case.' [Citations.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) "A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142; see also *People v. Bolden* (2002) 29 Cal.4th 515, 558-559; *People* v. *Wharton* (1991) 53 Cal.3d 522, 570; *People* v. *Barrick* (1982) 33 Cal.3d 115, 132; *People* v. *Randolph* (1993) 20 Cal.App.4th 1836, 1841.) "A pinpoint instruction relates specific evidence to the elements of the offense, highlighting a defense theory, and must be given on request, but need not be given sua sponte." (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777; see also *People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) "A defendant, upon proper request therefor, has a right to an instruction to direct the jury's attention to evidence from which a reasonable doubt of his guilt could be inferred." (*People* v. *Jeffers* (1996) 41 Cal.App.4th 917, 924-925.) "The trial court has an 'obligation to instruct on defenses, . . . and on the relationship of these defenses to the elements of the charged offense . . .' where '[¶] . . . it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense . . . .' [Citations.]" (*People* v. *Wooten* (1996) 44 Cal.App.4th 1834, 1848.) But, the court must "give a requested instruction concerning a defense only if there is substantial evidence to support the defense." (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1116; see also *People v. Pollock* (2004) 32 Cal.4th 1153, 1176)

A CALJIC No. 4.21.1 instruction must be given if requested by the defense and supported by substantial evidence. Voluntary intoxication, although not a defense to murder, may be a mitigating circumstance offered to disprove that the defendant actually formed the requisite specific intent of malice, either express or implied, which the prosecution must prove beyond a reasonable, and thereby reduces the degree of an intentional, unlawful homicide from murder to voluntary manslaughter. (*People v. San*

Nicolas (2004) 34 Cal.4th 614, 669; *People v. Martinez* (2003) 31 Cal.4th 673, 684-685; *People v. Whitfield* (1994) 7 Cal.4th 437, 451-452; *People v. Saille* (1991) 54 Cal.3d 1103, 1112; *People v. Martin, supra,* 78 Cal.App.4th 1107, 1114; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1160-1162.) A defendant is entitled to a pinpoint instruction in the terms of CALJIC No. 4.21.1 upon request, however, "only when there is substantial evidence of the defendant's voluntary intoxication *and the intoxication affected the defendant's 'actual formation of specific intent*.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677, italics added; see also *People v. Bolden, supra,* 29 Cal.4th 515, 559; *People v. Horton* (1995) 11 Cal.4th 1068, 1119; *People v. Saille, supra*, at p. 1117; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1623.) Thus, two distinct elements must be present in the evidence to justify the voluntary intoxication instruction requested by defendant: his intoxication, of course; and, its effect upon the actual presence of the mental state of malice. (*People v. Williams, supra*, at p. 677.)

Considerable evidence of defendant's intoxication was presented, based upon his admission of consumption of beer and wine on the morning of the killing, and his tested blood-alcohol level estimated at .21 or .22 when the homicide occurred. We do not, however, find substantial evidence in the record of the second necessary element of the defense: "that, because of voluntary intoxication, the intent to kill was not in fact formed." (*People v. Walker, supra*, 14 Cal.App.4th 1615, 1622.) Only one of the many officers present at the scene of the crime detected alcohol on defendant's breath, and none of the officers perceived in his demeanor or speech any indication that he was impaired by alcohol consumption. Defendant did not suggest in his testimony that alcohol prevented him from forming the mental state of express or implied malice: respectively, the intent to kill the victim, or the deliberate commission of an intentional act with conscious disregard for the victim's life that he knew endangered her life. (*People v. Rios* (2000) 23 Cal.4th 450, 460; *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.) In fact, defendant did not testify that he felt impaired at all by his drinking the morning of the killing.

To the contrary, defendant testified that he read the newspaper and perfumed routine household tasks, then went upstairs to say goodbye to his wife before leaving for work. Only when the victim expressed to him that she "hated" him and "wanted a divorce" to "destroy" him, did defendant become aware that he "hated her back" and, in a "rage," kicked her down the stairs. When defendant reached his wife at the bottom of the stairs, he recognized that the victim was gravely injured. He testified that he then straddled her, smashed her head into the floor, placed his hands around her neck, and finally choked her. Defendant also stated that he strangled the victim when faced with the realization that her head and face were so badly and irremediably "broken up" that he "had to stop her breathing." Thus, the overwhelming evidence established that defendant was conscious of perpetrating a deadly assault upon his wife, and at the bottom of the stairs acted with intent to cause her death by strangulation.

The expert testimony offered by the defense also did not intimate that defendant's ability to form the specific intent to kill required for murder may have been eliminated by his alcohol consumption. According to the forensic toxicologist and prison psychologist, defendant's alcohol dependence and personality disorder may have impaired his critical judgment and rendered him susceptible to "rage reaction" rather than rational thought when confronted with stress, but no testimony was presented that intoxication affected his mental state in a manner that negated malice. (See *People v. Ervin* (2000) 22 Cal.4th 48, 90.)

The only evidence of defendant's impaired mental state at the time of the killing was his testimony that he did not recall in detail all of his actions during the attack, and sometimes felt like he "wasn't there." He did not associate his lack of awareness or clarity of thought with alcohol, however, but rather with the rage he experienced. And significantly, his debilitated mental state did not, at least according to our reading of the evidence presented, preclude defendant from harboring the sudden, virulent hatred of his wife necessary to form his expressed intent to kill her. The essence of the defense and defendant's testimony was that he acted upon the provocation of his wife's expression of animosity and her declared plan to divorce him, not that impairment from drinking

alcohol rendered him unaware of his actions or incapable of intending their fatal consequences. Nothing in defendant's testimony or the remaining evidence of his mental state indicated that his intoxication prevented the actual formation of malice. We therefore conclude that the CALJIC No. 4.21.1 voluntary intoxication instruction requested by defendant was not supported by substantial evidence. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Williams, supra,* 16 Cal.4th 635, 677-678; *People v. Horton, supra,* 11 Cal.4th 1068, 1119-1120; *People v. Ramirez* (1990) 50 Cal.3d 1158; 1180-1181; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 378.) The court need not give pinpoint instructions on defenses such as voluntary intoxication "when the evidence is 'minimal and insubstantial.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201; see also *People v. Mills* (1977) 73 Cal.App.3d 539, 544.)

Even if we were to conclude that an additional instruction to specifically advise the jury to consider defendant's voluntary intoxication to determine whether he harbored intent to kill was supported by substantial evidence, we would not consider the trial court's failure to give it prejudicial error. The omission of a pinpoint instruction on voluntary intoxication requires reversal if it appears reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*People v. Ervin, supra,* 22 Cal.4th 48, 90-91; *People v. Lee* (1999) 20 Cal.4th 476, 62-63; *People v. Fudge* (1994) 7 Cal.4th 1075, 1112; *People v. Wharton, supra,* 53 Cal.3d 522, 571.) The jury received instructions on the lesser offense of manslaughter based upon heat of passion and provocation, along with the definition of voluntary intoxication. Thus, considering the instructions in their entirety the jury was effectively advised, as justified by the evidence, that if defendant was in an intoxicated state and malice was negated due to provocation of sudden quarrel or heat of passion, the offense was manslaughter rather than murder. Given the state of the evidence, nothing more was required and the instructions as given were not prejudicial to defendant. (*People v. Gutierrez, supra,* 28 Cal.4th 1083, 1144-1145; *People v. Seaton* (2001) 26 Cal.4th 598, 666*; People v. Lewis* (2001) 25 Cal.4th 610, 649-650; *People v. Ervin, supra,* at pp. 90-91.)

II. The Failure to Give a Unanimity Instruction.

Defendant also argues that the trial court committed error by failing to give a unanimity instruction related to the spousal battery offense charged as count 2. He claims "there were three acts that might have accounted for the conviction in count 2," but only one offense was charged by the prosecution. He therefore maintains that a unanimity instruction was necessary to ensure agreement by the jury on the "single act" "which constituted the charged offense."

A criminal defendant has a fundamental right to a unanimous jury verdict. (*People v. Jones* (1990) 51 Cal.3d 294, 305; *People v. Davis* (1992) 8 Cal.App.4th 28, 44; *People v. Martinez* (1988) 197 Cal.App.3d 767, 772.) From this constitutional underpinning, the rule has emerged that where the accusatory pleading charges a single criminal offense and the evidence shows more than one act committed by the defendant which could comprise the crime charged, the jury must be instructed in the words of CALJIC No. 17.01 or the equivalent of the requirement of unanimous agreement beyond a reasonable doubt that the defendant committed the same specific criminal act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 280-281; *People v. Von Villas* (1992) 10 Cal.App.4th 201, 259.) "Where no election is made, the jury must be given a unanimity instruction, such as CALJIC No. 17.01." (*People v. Butler* (2000) 85 Cal.App.4th 745, 755-756, fn. 4.) " 'CALJIC No. 17.01 focuses the jury's attention on a specific act and requires the jury to determine guilt as to that act beyond a reasonable doubt.' [Citation.]" (*People v. Robbins* (1989) 209 Cal.App.3d 261, 264.)

CALJIC No. 17.01 is "an appropriate instruction when conviction on a single count could be based on two or more discrete criminal events. In such cases it is appropriate the jurors all agree the defendant is responsible for the same discrete criminal event." (*People v. Davis, supra,* 8 Cal.App.4th 28, 45.) "The rule is limited by its rationale: 'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citation.]" (*People v. Robbins, supra,* 209 Cal.App.3d 261, 265; see also *People v. Beardslee* (1991) 53 Cal.3d 68, 93; *People v. Brown* (1996) 42 Cal.App.4th 1493, 1500.) " '. . . [T]he

possibility of disagreement exists where the defendant is accused of a number of unrelated incidents . . . leaving the jurors free to believe different parts of the testimony and yet convict the defendant. . . . [¶] If under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary.' [Citations.]" (*People v. Burns* (1987) 196 Cal.App.3d 1440, 1458.)

A unanimity instruction is also not required " '. . . if the case falls within the continuous course of conduct exception. . . .' " (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1526.) "The California Supreme Court has made clear that a unanimity instruction is inappropriate where one offense is charged and a continuous course of conduct is shown to establish that single offense." (*People v. Whitham* (1995) 38 Cal.App.4th 1282, 1296.) "The continuous course of conduct exception arises in two contexts. [Citations.] 'The first is when the acts are so closely connected that they form part of one and the same transaction, and thus one offense. [Citation.] The second is when . . . the statute contemplates a continuous course of conduct of a series of acts over a period of time. [Citation.]' [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299; see also *People v. Whitham, supra,* at p. 1295; *People v. Avina* (1993) 14 Cal.App.4th 1303, 1309.) " ' ". . . This second category of the continuous course of conduct exception has been applied to a limited number of varying crimes, including pimping [citation], pandering [citation], failure to provide for a minor child [citation], contributing to the delinquency of a minor [citation], and child abuse [citation]." [Citation.] [¶] To this exemplary list could be added *spousal battery* [citation], annoying or molesting a child [citation], acting as accessory to a felony [citation] and dissuading a witness from testifying [citation].' [Citation.]" (*People v. Funes, supra,* at p. 1526, italics added; see also *People v. Higgins* (1992) 9 Cal.App.4th 294, 301-302.)

We conclude that based upon the facts presented in the record before us, the continuous course of conduct exception dispensed with the necessity of a unanimity instruction. The continuous course of conduct doctrine " 'is meant to apply not to all crimes occurring during a single transaction but only to those "where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or

reject the victim's testimony in toto." [Citation.]' [Citation.]" (*People v. Jenkins, supra,* 29 Cal.App.4th 287, 299.) The three possible acts that comprised spousal battery—the kick down the stairs, the smashing of the victim into the wall part way down the stairs, and the slamming of her head into the floor at the bottom of the stairs—occurred within moments of each other. Defendant testified that after he kicked the victim down the stairs he flew after her and directly continued the assault. The acts were not separated in time or by any intervening act, save defendant's immediate flight down the stairs in pursuit of the victim as she fell. The evidence proves commission of a single, continuous battery upon the victim that consisted of three connected criminal acts. And, the evidence was susceptible to one of only two possible findings by the jury: either all of the acts were committed by defendant during one unremitting assault, or none of them were. Based upon the evidence presented we do not believe the jurors would have disagreed upon which act was committed by defendant, yet convict him of the crime charged. "[W]hen the issue presented to the jury is whether a defendant committed a course of conduct and not whether he committed a specific act on a specific day, the prosecutor does not have to elect a specific act and the jury need not unanimously agree on a specific act." (*People v. Higgins, supra,* 9 Cal.App.4th 294, 301.) The spousal battery offense also fits into the exception as an offense that by statutory definition contemplates a continuous course of criminal conduct over time. (*People v. Jenkins, supra,* at pp. 299-300; *People v. Funes, supra,* 23 Cal.App.4th 1506, 1526; *People v. Healy* (1993) 14 Cal.App.4th 1137, 1140.) The trial court's failure to give a unanimity instruction was not error.

III. The Imposition of Consecutive Sentences on Counts One and Two.

We turn to defendant's claim that the trial court erred by imposing consecutive terms on counts 1 and 2. He argues that the two offenses comprised a "continu[ous] course of conduct with one objective," to "strike out at his wife after she berated and belittled him and said she planned to divorce him." He maintains that the jury finding of second degree malice murder, rather than a verdict of first degree premeditated murder based upon an express intent to kill, illustrates the single objective associated with both

the spousal battery and the murder. He therefore contends that section 654 prohibited multiple sentences, and the trial court's finding of separate motives for the acts of spousal battery and murder also violated his "right to a jury trial under the Sixth Amendment."

The double jeopardy clause of the Fifth Amendment of the federal Constitution and section 654 forbid multiple punishment for the same offense. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Wader* (1993) 5 Cal.4th 610, 670.) Section 654 provides in pertinent part that "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one . . . ." (See also *People v. Kramer* (2002) 29 Cal.4th 720, 722; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.) The proscription against double punishment in section 654 is applicable where the defendant's course of conduct violated more than one statute but nevertheless comprised a single act or indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Williams* (1992) 9 Cal.App.4th 1465, 1473; *People v. Barker* (1986) 182 Cal.App.3d 921, 941.) "On the other hand, section 654 does not apply when the evidence discloses that a defendant entertained multiple criminal objectives independent of each other. In that case, 'the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] . . .' [Citation.]" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

"The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the

defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

" 'The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant's intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citation.]" (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657; see also *People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Avalos, supra,* 47 Cal.App.4th 1569, 1583; *People v. Williams, supra,* 9 Cal.App.4th 1465, 1473.) "We review the trial court's findings 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

We conclude that the evidence supports the trial court's finding of multiple violent acts committed by defendant with separate objectives. The theory offered by the prosecution was that defendant acted with distinct mental states associated with the two offenses committed upon his wife during the continuing attack: first, to kick the victim down the stairs, and continue the assault upon her by slamming her head into the wall and floor, but without any intent to kill; and second, after he reached the bottom of the stairs and realized the serious nature of the injuries he inflicted upon her, to strangle her with express or implied malice. Defendant's lack of intent to kill his wife when he first dispatched her down the stairs is illustrated by the fact that he did not strangle her there, but rather just assaulted her in a rage. The evidence of defendant's statement that he decided to kill the victim when he found her injured on the floor after the fall down the stairs further supports the prosecution's theory of multiple acts and objectives. Once defendant arrived at the bottom of the stairs and slammed the victim's head into the floor, he had the opportunity to abandon the assault. Instead, he assessed the victim's condition enough to decide that she appeared to be irreparably and permanently injured, then proceeded to strangle her to "stop her breathing." Finally, the injuries inflicted upon the

victim by the acts of spousal battery are separate from the strangulation. Thus, the trial court properly imposed multiple sentences for the individual violations committed in pursuit of independent objectives. (*People v. Coleman, supra,* 48 Cal.3d 112, 162-163; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190.)

The trial court's finding of separate objectives also did not violate defendant's right to a jury trial. "The question of whether the defendant held multiple criminal objectives is one of fact for the *trial court*, and, if supported by any substantial evidence, its finding will be upheld on appeal." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466, italics added.) "[I]n determining whether Penal Code section 654 applies, the trial court is entitled to make any necessary factual findings not already made by the jury." (*People v. Centers* (1999) 73 Cal.App.4th 84, 101.) While "it is the function of the jury to determine 'the wrongful criminal conduct for which punishment is being imposed,' " "it remains the function of the trial court to decide matters such as . . . whether the potential exists for multiple punishment proscribed by section 654, as part of the court's duty to determine 'what terms can be imposed from among those available based on the conviction offenses and the enhancements found true. [Citations.]' [Citation.]" (*People v. Wiley* (1995) 9 Cal.4th 580, 590, quoting from *People v. Hernandez* (1988) 46 Cal.3d 194, 205.) We do not disagree with defendant's assertion that where a finding of a single objective is subsumed within the jury verdict "the trial court cannot countermand the jury and make the contrary finding" of multiple objectives. (*People v. Bradley* (2003) 111 Cal.App.4th 765, 770.) But where the jury has not made a specific finding of a single act or objective, the verdict does not foreclose the trial court from imposing multiple sentences for divisible acts. (See *People v. Centers, supra,* at p. 101; *People v. Nguyen, supra,* 204 Cal.App.3d 181, 190.)

Here, the jury verdict of second degree murder based upon either express or implied malice did not preclude a finding that a separate objective was associated with the spousal battery. The offense of spousal battery in violation of section 273.5 is " 'a general intent crime requiring only that the assailant have "purpose or willingness to commit the act," *not the specific intent to inflict the traumatic injury*.' [Citations.]"

(*People v. Campbell* (1999) 76 Cal.App.4th 305, 308.) In contrast, "Second degree murder requires express or implied malice—i.e., the perpetrator must kill another person with the specific intent to do so; or he or she must cause another person's death by intentionally performing an act, knowing it is dangerous to life and with conscious disregard for life." (*In re Smith* (2003) 114 Cal.App.4th 343, 366.) " 'The jury's verdict of second degree murder necessarily found that at the very least, defendant bore implied malice' " toward the victim. (*People v. Taylor* (2004) 32 Cal.4th 863, 869, quoting from *People v. Dennis* (1998) 17 Cal.4th 468, 512.) The mental component of implied malice involves an act deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 110; *People v. Jones* (2000) 82 Cal.App.4th 663, 667.) The defendant must subjectively realize the risk to human life. (*People v. Klvana* (1992) 11 Cal.App.4th 1679, 1704.) Implied malice does not fit the description of general intent, and although it "may not fall literally within the *Hood*[3] formulation of specific intent," the "element of implied malice that requires that the defendant act with knowledge of the danger to, and in conscious disregard of, human life, is closely akin to *Hood's* definition of specific intent, which requires proof that the defendant acted with a specific and particularly culpable mental state." (*People v. Whitfield, supra*, 7 Cal.4th 437, 450, fn. added; see also *People v. Reyes, supra*, 52 Cal.App.4th 975, 984.) Thus, the jury verdict in the present case did not foreclose the trial court from finding that defendant separately entertained the intent to kill the victim, and the evidence justified the finding. (*People v. Nguyen, supra,* 204 Cal.App.3d 181, 190.)

IV. The Imposition of Upper and Consecutive Terms Without a Jury Finding.

In a supplemental brief defendant argues that under the recent United States Supreme Court decision in *Blakely, supra,* 124 S.Ct. 2531, the trial court erred by imposing upper and consecutive terms "based upon factors which had not been presented to the jury and were not therefore found beyond a reasonable doubt." Defendant asserts

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[3] *People v. Hood* (1969) 1 Cal.3d 444, 457-458.

that the California Determinate Sentencing Law authorizes imposition of an upper or consecutive term, like the "exceptional sentence" in *Blakely*, only upon a finding of "additional aggravating factors" by the trial court by a "based upon a preponderance of the evidence standard." He maintains that for the purposes of the *Blakely* opinion, however, the "statutory maximum" sentence which cannot be exceeded without a finding by the jury and proof beyond a reasonable doubt is limited to middle and concurrent terms of imprisonment.[4] Defendant therefore contends that as a result of the improper "additional factual findings" made by the trial court "without the benefit of a jury" as mandated by *Blakely*, he received an aggregate sentence of 23 years to life in prison—15 years to life for the murder conviction, plus a consecutive four-year upper term for spousal battery, and a four-year enhancement for infliction of great bodily injury—rather than 15 years to life on count 1 and a concurrent term of three years on count 2.

A. Waiver.

We first dispose of respondent's contention that defendant "forfeited" any claim of *Blakely* error by failing to request a jury finding on aggravating factors or otherwise object to the sentence on grounds of violation of his jury trial rights. "Claims of error relating to sentences 'which, though otherwise permitted by law, were imposed *in a procedurally* or factually *flawed manner*' are waived on appeal if not first raised in the trial court." (*People v. Brach* (2002) 95 Cal.App.4th 571, 577; see also *People v. Breazell* (2002) 104 Cal.App.4th 298, 304-305.) According to a fundamental principle of appellate procedure, "with certain exceptions, an appellate court will not consider claims of error that could have been—but were not—raised in the trial court." (*People v. Vera* (1997) 15 Cal.4th 269, 275.) " '[A]n appellate court should not take notice of matters not first presented to and considered by the trial court, where to do so would unfairly permit "one side to press an issue or theory on appeal that was not raised below." [Citation.]' [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 171.) " 'Generally speaking, the

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4 We are of course aware that the effect of *Blakely, supra,* 124 S.Ct. 2531, on California sentencing law is already before the California Supreme Court in *People v. Black*, S126182, and *People v. Towne*, S125677.

rationale underlying the rule requiring objection below as a prerequisite to complaint on appeal regarding some error by the trial court is predicated on the premise that, in its absence, the People would be deprived of the opportunity to cure the defect in the trial court and the defendant would be allowed to gamble on a favorable result—secure in the knowledge that if he did not prevail there, he would be able to prevail on appeal. . . .' [Citation.]" (*People v. Zamarron* (1994) 30 Cal.App.4th 865, 870; see also *People v. McClellan* (1993) 6 Cal.4th 367, 377.) The waiver doctrine also seeks to " ' "encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided . . . ." ' [Citation.]" (*People v. Peel* (1993) 17 Cal.App.4th 594, 600.)

"The California Supreme Court has repeatedly held" that even "constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal." (*People v. Rudd* (1998) 63 Cal.App.4th 620, 628, citing *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173-174; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) " ' "No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." [Citation.]' [Citation.]" (*People v. Saunders* (1993) 5 Cal.4th 580, 590; see also *People v. Rudd, supra,* at p. 629.)

However, "Not all claims of error are prohibited in the absence of a timely objection in the trial court. A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera, supra,* 15 Cal.4th 269, 276.) Further, failure to object does not prevent correction or vacation of an "unauthorized sentence" on appeal. (*In re Birdwell* (1996) 50 Cal.App.4th 926, 931.) "An unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal." (*People v. Breazell, supra,* 104 Cal.App.4th 298, 304.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance

in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Breazell, supra,* at p. 304; *People v. McGee* (1993) 15 Cal.App.4th 107, 117.) "Claims involving unauthorized sentences or sentences entered in excess of jurisdiction can be raised at any time." (*People v. Andrade* (2002) 100 Cal.App.4th 351, 354; see also *People v. Turner* (2002) 96 Cal.App.4th 1409, 1415.) A related exception to the waiver rule is that it "is generally not applied when the alleged error involves a pure question of law, which can be resolved on appeal without reference to a record developed below." (*People v. Williams* (1999) 77 Cal.App.4th 436, 460.)

In the present case defendant has presented a claim of deprivation of his fundamental constitutional rights to jury trial and proof beyond a reasonable doubt. (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444.) The constitutional challenge raised by defendant is an issue of law that we may decide without reference to the particular sentencing record developed in the trial court. (*In re Justin S.* (2001) 93 Cal.App.4th 811, 815.) And if his position is found to have merit, the sentence may not lawfully be imposed under any circumstances without a jury trial, and as an unauthorized component of his disposition may be corrected on appeal despite the lack of an objection in the trial court. (*Ibid.*; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534; *People v. Chambers* (1998) 65 Cal.App.4th 819, 823; *In re Paul R.* (1996) 42 Cal.App.4th 1582, 1590; *People v. Sexton* (1995) 33 Cal.App.4th 64, 69.) Finally, *Blakely, supra,* 124 S.Ct. 2531 was decided after defendant was sentenced, and therefore he had no reason to object in the face of previously established law that consistently denied a criminal defendant the constitutional right to a jury trial in connection with the imposition of an upper term of imprisonment. (See *People v. Vu* (2004) 124 Cal.App.4th 1060, 1065; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-1231; *People v. Ramos* (1980) 106 Cal.App.3d 591, 605-606; *People v. Williams* (1980) 103 Cal.App.3d 507, 510; *People v. Betterton* (1979) 93 Cal.App.3d 406, 410-411; *People v. Nelson* (1978) 85 Cal.App.3d 99, 102-103; *United*

States v. Harrison (8th Cir. 2003) 340 F.3d 497, 500.) We cannot find that defendant voluntarily and intelligently waived a known right or forfeited his right to object on appeal by failing specifically to raise an objection in a timely fashion. We therefore conclude that defendant has not waived his right to complain of denial of the right to a jury trial under *Blakely*, and despite the lack of an objection below elect to address his constitutional claims on their merits. (*People v. Peck* (1996) 52 Cal.App.4th 351, 362, fn. 5; see also *People v. Marshall* (1996) 13 Cal.4th 799, 831-832; *People v. Ashmus, supra,* 54 Cal.3d 932, 976; *People v. Juarez* (2004) 124 Cal.App.4th 56, 75-76; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 537; *People v. Williams* (1998) 61 Cal.App.4th 649, 656-657.)

B. The Blakely Opinion.

In *Blakely*, the United States Supreme Court revisited the rule articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, (*Apprendi*), that "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely*, *supra*, 124 S.Ct. 2531, 2536, italics added.) At issue in *Blakely* was whether the determinate sentencing procedure followed by courts in the State of Washington deprived the petitioner of his "federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence." (*Ibid*.) The petitioner entered a guilty plea to second-degree kidnapping of his estranged wife in which he admitted domestic violence and use of a firearm, but "no other relevant facts." (*Id*., at pp. 2534-2535.) Under the Washington Criminal Code (§§ 9A.40.030(3); 9A.20.021(1)(b)), second-degree kidnapping was designated a class B felony that carried a maximum statutory sentence of 10 years. (*Blakely*, *supra*, at p. 2535.) The governing Washington sentencing guidelines further limited the presumptive " 'standard range' " to 49-53 months, but authorized the judge to impose a sentence above the specified range, although below the 10-year maximum, upon a finding by a preponderance of the evidence of " 'substantial and compelling reasons justifying an exceptional sentence.' " (*Ibid.,* citing Wash. Rev. Code § 9.94A.120(2).) At the sentencing hearing, an

" 'exceptional sentence' " of 90 months was imposed, based upon the trial judge's finding that the petitioner used " 'deliberate cruelty' " in the commission of the offense, which was one of the statutorily enumerated grounds for departure from the standard sentencing range. (*Blakely*, *supra*, at p. 2535.)[5]

The court in *Blakely* reaffirmed the commitment articulated in its prior decisions in *Apprendi, supra,* 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, "to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." (*Blakely, supra*, 124 S.Ct. 2531, 2538-2539.) The Sixth Amendment, declared the court, "is not a limitation on judicial power, but a reservation of jury power." (*Blakely, supra*, at p. 2540.) The court further observed that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict." (*Blakely, supra*, at p. 2539.)[6]

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5 Under the Washington Sentencing Reform Act, the factors that may be relied upon to justify a finding of an exceptional sentence are listed, but the list is illustrative not exhaustive. A factor may be taken into consideration to impose an exceptional sentence only if it is not already taken into account in the calculation of the standard range sentence for the offense. (*Blakely, supra*, 124 S.Ct. 2531, 2535.)

6 In *Apprendi, supra*, 530 U.S. 466, 468-469, the court had earlier invalidated a New Jersey hate-crime statute that authorized a 20-year enhanced sentence, despite the standard 10-year statutory maximum, if the judge found the crime had been committed " 'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " (Quoting N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000).) The court reasoned in *Apprendi* that the due process clause and the Sixth Amendment right to a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt,' " despite the label of " 'sentencing factor' " rather than " 'element' " of the crime placed upon the finding by the Legislature. (*Apprendi, supra*, at pp. 478-479, citations omitted.) The court in *Apprendi* determined that, "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict," and therefore must be submitted to the jury. (*Id*., at p. 494, fn. 19.) The essential holding of *Apprendi* was: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' [Citations.]" (*Apprendi, supra*, at p. 490; see also *People v. Scott* (2001) 91 Cal.App.4th 1197, 1209.)

The court in *Blakely* operated from the conclusion reached in both its *Apprendi* and *Ring* decisions that a defendant's constitutional rights have been violated when a judge "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra*, at 491-497, [ ]; *Ring, supra*, at 603-609, [ ]." (*Blakely, supra*, 124 S.Ct. 2531, 2537.) The notion advocated by the state in *Blakely* "that there was no *Apprendi* violation because the relevant 'statutory maximum' is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b)," and "no exceptional sentence may exceed that limit," was rejected as contrary to those "clear" precedents. (*Blakely, supra*, at p. 2537.) Instead, the court defined "the 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*)

The court then concluded: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, '[a] reason offered to justify an exceptional sentence can be considered only if

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Then in *Ring v. Arizona, supra,* 536 U.S. 584, 592-593, a Sixth Amendment violation was found in an Arizona law that authorized the death penalty if the judge found one of ten specified aggravating factors. The court declared that, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. . . . A defendant may not be 'expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' " (*Ring v. Arizona, supra,* at p. 602.) As in *Apprendi*, the Arizona aggravating death penalty factors were considered to "operate as 'the functional equivalent of an element of a greater offense,' " and thus the Sixth Amendment required "that they be found by a jury." (*Ring v. Arizona, supra,* at p. 609.) The court expressed the fundamental principle that a jury trial is required "o[n] any fact on which the legislature conditions an increase in . . . maximum punishment." (*Id*., at p. 589.)

it takes into account factors other than those which are used in computing the standard range sentence for the offense,' [citation], which in this case included the elements of second-degree kidnapping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b). Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The 'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." (*Blakely, supra*, 124 S.Ct. 2531, 2537-2538, fn. omitted.) "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." (*Blakely, supra*, at p. 2538.) "Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence." (*Ibid.*, fn. 8.)

In the *Blakely* opinion, the court nevertheless took care to point out that reversal of the "exceptional sentence" imposed under the Washington sentencing law on the basis of a disputed determination that the petitioner acted with deliberate cruelty, was not the equivalent of " 'find[ing] determinate sentencing schemes unconstitutional.' " (*Blakely, supra*, 124 S.Ct. 2531, 2540.) Thus, our task, in accordance with the *Blakely* decision, is to examine the nature of the California Determinate Sentencing Law—and in particular the imposition of an upper term—to determine whether it is "implemented in a way that respects the Sixth Amendment." (*Ibid*.)

V. The Upper Term.

Under the California Determinate Sentencing Law (DSL), "The statutory basis for the selection of punishment for offenses or enhancements which contain three potential

terms is section 1170, subdivision (b) which states in pertinent part: 'When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime. . . . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. . . .' " (*People v. Brown* (2000) 83 Cal.App.4th 1037, 1045, italics added.) California Rules of Court, rules 4.421 and 4.423,[7] respectively, articulate the "circumstances in aggravation and mitigation of an offense. (Judicial Council of Cal., Annual Rep. (1978) p. 3.) [¶] 'Facts relating to the crime' are set forth in subdivision (a), and 'facts relating to the defendant' in subdivision (b), of each rule." (*People v. Cheatham* (1979) 23 Cal.3d 829, 832-833.) Under rule 4.420(b), "The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence."[8] (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.)

"A trial court weighs aggravating and mitigating factors when it faces the discretionary decision of which of three possible terms to impose under the determinate sentencing law." (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250.) " 'Selection of

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[7] All further references to rules are to the California Rules of Court.

[8] Rule 4.420 reads: "(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

"(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation."

the upper term is justified only if, considering the *entire record* of the case, including the probation officer's report, other reports properly filed in the case and other competent evidence, circumstances in aggravation are established by a preponderance of the evidence and outweigh circumstances in mitigation.' [Italics added.] (Cal. Rules of Court, rule 439(b).)." (*People v. Laws* (1981) 120 Cal.App.3d 1022, 1037.) "[S]ection 1170, subdivision (b), as implemented by rule [4.420], leaves to the lower court a choice to be made in the exercise of its discretion as to whether, even after weighing the aggravating circumstances against the mitigating circumstances and determining the aggravating circumstances preponderate, it will impose the upper or middle term as the base term. The statute does not mandate a selection by the court of either of those terms under any particular circumstances, but mandates only selection of the middle term in the absence of aggravating or mitigating circumstances." (*People v. Myers* (1983) 148 Cal.App.3d 699, 704.)

While the consideration of sentencing factors and discretionary selection of an appropriate punishment are traditional sentencing functions, the specification of a presumptive middle term brings the California DSL into conflict with the rather confounding standards articulated in *Blakely, supra*, 124 S.Ct. 2531 and imparts error into the imposition of an upper term upon defendant. Under section 1170, subdivision (b), three possible terms of imprisonment for each offense are specified, but the sentencing court may not impose the upper term without a finding by a preponderance of the evidence—rather than beyond a reasonable doubt—that circumstances in aggravation are established by a preponderance of evidence and outweigh circumstances in mitigation. (*People v. Wright* (1982) 30 Cal.3d 705, 709-710.) "In determining which term to impose, 'the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.' [Citation.]" (*Id.,* at p. 709.) "[A] special finding of aggravation must be made before the upper term for an offense can be imposed . . . ." (*In re Manzy W*. (1997) 14 Cal.4th 1199, 1202, fn. 1.) " '[T]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances

before imposition of the aggravated term is proper, creates a presumption.' [Citation.]" (*People v. Edwards* (1993) 13 Cal.App.4th 75, 79, quoting from *People v. Avalos* (1984) 37 Cal.3d 216, 233.)

Thus, while the upper term is the most severe sentence the court may select for the commission of a particular offense, the maximum penalty the court has authority to impose under the California DSL without finding additional facts is the middle term. (*People v. Vu, supra,* 124 Cal.App.4th 1060, 1066.) To select an upper term the sentencing court does not merely consider sentencing factors before exercising discretion, as occurs with the choice of a consecutive or concurrent term, but rather must find circumstances in aggravation that outweigh circumstances in mitigation. (*People v. Wright, supra,* 30 Cal.3d 705, 709-710.) Under the DSL a sentencing judge cannot make the discretionary decision to increase a sentence above the middle term without first finding "facts to support it beyond the bare elements of the offense[;]" the verdict alone does not authorize the sentence. (*Blakely, supra*, 124 S.Ct. 2531, 2538, fn. 8.) With the requirement of a predicate finding before an upper term may be imposed, the sentencing scheme violates the directive in *Blakely* that the " 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without any additional findings*." (*Blakely, supra*, at p. 2537, italics added.)

VI. The Consecutive Term.

We find nothing in the trial court's exercise of sentencing discretion to select a consecutive subordinate term of imprisonment, however, that violates the precepts of *Blakely*. A concurrent term is not a specified presumptive or standard maximum sentence. Section 669 provides that when a defendant "is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts," the sentencing court "shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (See also *People v. Downey* (2000) 82 Cal.App.4th 899, 912-913.)

Section 669 thus imposes a mandatory duty upon the trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively, but the choice of a consecutive or concurrent term is entirely discretionary with the trial court based upon consideration of the sentencing criteria set forth as guidelines in rule 4.425. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256; *In re Calhoun* (1976) 17 Cal.3d 75, 80-81; *People v. Shaw* (2004) 122 Cal.App.4th 453, 458; *People v. Coelho* (2001) 89 Cal.App.4th 861, 886; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 194; *People v. Lepe* (1987) 195 Cal.App.3d 1347, 1350.) "[T]he provisions of rule [4.425] are merely '[c]riteria affecting the decision to impose consecutive rather than concurrent sentences . . . .' They are guidelines, not rigid rules courts are bound to apply in every case . . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 86-87.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense (§ 1170, subd. (b)), there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. (§§ 669, 1170.1, subd. (a); rule [4.]433(c)(3).)" (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) While the sentencing rules create a statutory presumption in favor of the middle term, no comparable statutory presumption exists in favor of either concurrent or consecutive sentences for multiple offenses. (*Id.* at p. 923.)

Therefore, a consecutive term does not represent a departure from any standard or presumptive sentencing range. Either a consecutive or concurrent term is within the trial court's discretion and the permissible statutory range of punishment if the defendant has been found guilty of multiple crimes by the jury. Nor is the sentencing court required to make an additional finding of fact as a prerequisite to imposing the more severe punishment of a consecutive sentence. The jury verdict, not any additional necessary finding of fact by the trial court, justifies the imposition of a consecutive term. (*People v. Shaw, supra*, 122 Cal.App.4th 453, 459.) The decision to select a consecutive sentence is

only made once the accused has been found beyond a reasonable doubt by the jury to have committed two or more offenses in compliance with the Sixth Amendment right to a jury trial under *Blakely, supra,* 124 S.Ct. 2531. A consecutive term imposed under California law is a discretionary sentence choice that does not increase the penalty beyond the prescribed statutory maximum, and is not tantamount to an *Apprendi* enhancement or a *Blakely* exceptional sentence. (See *People v. McPherson* (2001) 86 Cal.App.4th 527, 532; *People v. Farr* (1997) 54 Cal.App.4th 835, 843.) We therefore conclude that defendant was not denied his due process rights to a jury trial and finding of guilt beyond a reasonable doubt under *Blakely* by the trial court's selection of a consecutive subordinate term. (*People v. Shaw, supra*, at p. 459.)

VII. Prejudice.

We turn to the issue of prejudice. We conclude that any sentencing error under *Blakely, supra,* 124 S.Ct. 2531 is not a structural defect that demands automatic reversal. (See *People v. Epps* (2001) 25 Cal.4th 19, 29; *People v. Vera, supra,* 15 Cal.4th 269, 278; *People v. Marshall, supra,* 13 Cal.4th 799, 851-852.) Rather, we follow the federal standard of review of constitutional errors (*Chapman v. California* (1967) 386 U.S. 18, 24), and must reverse the sentence unless it appears beyond a reasonable doubt that the assumed error did not contribute to the judgment. (*People v. Neal* (2003) 31 Cal.4th 63, 86; *People v. Carter* (2003) 30 Cal.4th 1166, 1221-1222; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326; *People v. Vu, supra,* 124 Cal.App.4th 1060, 1070; *People v. Emerson* (2004) 124 Cal.App.4th 171, 180.)

Here, the sentencing factors relied upon by the trial court to impose the upper term for spousal battery—a particularly vulnerable victim kicked from behind by defendant, "separate acts" of excessive violence committed by defendant with "separate motives" at different locations in the house that inflicted separate injuries—were admitted by defendant and not subject to any disputed evidence. With the evidence in support of the aggravating circumstances overwhelming, we conclude that beyond a reasonable doubt the same result of an upper term based upon a finding of prevailing aggravating

circumstances would have been reached if the issue had been presented to the jury. The error was not prejudicial to defendant, and reversal is not required.

Accordingly, the judgment is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Stein, J.